

## **Judge Yair Tirosh**

**Case 3758/17**

### **Military Prosecution**

(Represented by Lt. Shauloff)

**v**

### **Defendant (minor)**

(Represented by Adv. Ramati and Adv. Abu Warda)

## **Decision - 2 August 2017**

### **Facts of the case**

The defendant, XXXX, from XXX, born in XXXX, was indicted for the commission of the following offences: attempted assault under aggravating circumstances and possessing a knife.

As detailed in the indictment, on 11 March 2017, the defendant held a knife with a 20 cm blade and attempted to assault a person at the checkpoint near the Tomb of the Patriarchs.

According to the indictment, the defendant had decided on the day of the incident to stab Jews. For that purpose, he had acquired a 20 cm long knife which he had purchased earlier in the Hebron market. After buying the knife, the defendant went to the Tomb of the Patriarchs, and upon his arrival went near the metal detector at the sentry post by the entrance. The metal detector beeped and a nearby IDF soldier signaled to the defendant to undergo another scan and remove all his belongings from his pocket. The defendant pulled up his shirt and the soldier saw that he was carrying a large object on his right side. The soldier cocked his weapon and ordered the defendant to exit the post and remove the knife, and the defendant obeyed the soldier immediately and handed over the knife. According to the prosecution, the defendant attempted to stab Jews at the Tomb of the Patriarchs and therefore he was indicted for attempted assault under aggravating circumstances. The defendant was also indicted for possessing a knife illegally due to the incident.

### **Delineation of the dispute between the parties**

In the beginning of his trial, the defendant confessed to the second charge ascribed to him, namely possessing a knife. The dispute between the parties remains, therefore, as to the question of whether the defendant committed the offence ascribed to him in the first charge of the indictment, i.e. attempted assault under aggravating circumstances.

Most of the evidence was submitted with the agreement of both parties and two testimonies were heard in the case: Police investigator Iyal Asad (hereby referred to as *the investigator*) and the defendant who testified in his own defence.

Based on the evidence and testimonies, the prosecution argued that the defendant should be convicted of attempted assault under aggravating circumstances. It based its argument on the defendant's statement at the Police which in the prosecution's view is preferable to his testimony in court, testimonies by soldiers who stood at the checkpoint, two video clips depicting the incident, the recording documenting the defendant's interrogation and a photo of the knife seized at the checkpoint. The prosecution also claimed that the defendant's lies in his testimony in court and the lack of testimonies by defence witnesses who could have aided the defense corroborate its claims.

The defence has raised the following key claims in its summary:

- a. Severe flaws occurred during the defendant's interrogation which necessitated the disqualification of his statement as admissible evidence.
- b. Alternatively, even if the defendant's statement is admissible, the weight it can be given is so low that it does not justify a conviction in view of its content, the circumstances of its recording, the defendant's statement in court and the lack of corroborating evidence.

## **Discussion**

The decision facing this court regards one key question: was it proven that the defendant had attempted to assault a person in the Tomb of the Patriarchs on the day of his arrest. For the purpose of examining whether the defendant has committed said offence, let us first examine the testimonies describing the case.

Prosecution witness no. 2, an IDF soldier who stood at the checkpoint, describes the incident in detail in his statement delivered to the police on that day:

*"Today, at around 17:20, I was on guard duty at the checkpoint of the Tomb of the Patriarchs. I recognized suspect XXX when he was screened by the metal detector, which beeped. I gestured to him to repeat the scan and gestured with my hands to remove everything from his pockets. Under pressure, he lifted his shirt, I saw some object attached to his right hip, yelled at him to come out to the gate, aimed my gun at him and told him to lift his shirt, and then I definitely spotted a knife, I cocked my gun and ordered him to remove the knife, the suspect threw down the knife, and I told him to lie on the ground.*

*Q: At what point did you recognize the knife on him?*

*A: When he passed through the metal detector and it beeped I told him to go back and told him to lift his shirt.*

*Q: What was the suspect's response after you spotted the knife?*

*A: He froze, especially when I cocked the gun, and he raised his hands"*

In addition, the court has received two video clips in which the defendant is seen during the incident passing through the metal detector and handing over the knife, and a memo by prosecution witness no. 2 which recounts the seizing of the knife and a photo of the knife. The court has also received the police statement of prosecution witness no. 3, a soldier who stood at the checkpoint during the incident, and stated the following:

*"Today, during a shift at the Tomb of the Patriarchs checkpoint, together with soldier (prosecution witness no. 2) at around 17:20 I spotted a Palestinian kid who came over, fearful and shocked, and when my commander (prosecution witness no. 2) started asking him questions he began to step back after he went through the metal detector and it beeped and he stepped back, and then I went on the radio to report and lost eye contact with them".*

It should be noted that the parties agree on this evidence, for all this implies.

The picture emerging from the testimonies and video clips documenting the incident is clear. The defendant arrived at the checkpoint with a large knife which seems to be new, hidden near his right hip. When he arrives, he seems "fearful and shocked" in the clip, as well as according to the soldiers' testimony, he passes through the metal detector and it beeps, he steps back. At this stage, after he was asked by the soldier, he pulled up his shirt, took out the knife slowly and raised his hands. It should be noted that from said testimonies and clips, one cannot tell that the defendant attempted to stab a person. On the contrary, it follows from the soldiers' account and the clips that the defendant arrived at the scene with the knife in his possession and did not attempt to conceal his arrival but came straight up to the metal detector knowing the knife would beep when he tried to pass through the checkpoint. It is also evident from the testimonies and clips that the defendant carried out all the soldiers' instructions and did not try to take any violent action.

In view of this, the conclusion is that one cannot learn from the soldiers' testimonies and the defendant's behaviour as to his intention to assault a person. On the contrary, his conduct according to testimonies and clips is one of a "fearful shocked" person who obeys the soldiers' instructions completely. In view of these findings one should ask whether there is any other evidence indicating that the defendant arrived at the checkpoint with the intention of assaulting a person by stabbing.

In this context, the court was presented with two factual alternatives by the prosecution and the defence, which are based on different interpretations of the additional evidence presented in court.

The first factual alternative, presented by the Police, claims the defendant arrived at the scene with the intention of assaulting and stabbing a person. This alternative is primarily based on the defendant's statements during his police interrogation.

The second possible alternative, claimed by the defence, is that the defendant did not intend an attack using the knife, but rather wanted to be arrested by security forces, in accordance with his statements in court.

In order to decide between the two different factual accounts, one should review the corpus of evidence in the case, especially the defendant's testimony in court and his police interrogation, including the recording which documents the investigation. One should also review additional evidence including the police investigator's court testimony and additional evidence which was submitted with the agreement of both parties. Let us address the court testimonies.

### **The police investigator's testimony**

The first testimony on the part of the prosecution was by police investigator Sergeant Major Iyal Asad (hereby referred to as the investigator). In the beginning of his testimony, he noted that he had been serving in the police for a year and a half, and during the first half of his service he had undergone the basic police training. He had been working as an investigator for several months by the time of the interrogation.

When the investigator was asked about the defendant's behaviour during the interrogation he noted that the former was quiet during the interrogation, even after he was directly accused, which was exceptional in his view. The investigator noted that he let the defendant sign a form as to his rights prior to the interrogation, and it was submitted in court, and that the defendant had received an oral explanation from him on the matter. The investigator also noted that he had explained to the defendant three times that he had a right to consult a lawyer and added that the defendant did not do so and even claimed he did not know his family's phone numbers.

The investigator also stated in his testimony that he had tried to find the phone number of the defendant's parents in the systems available to the Police, with no luck. He also noted that the defendant had replied to him he couldn't remember his parents' phone number and also that he had no number for a lawyer. The investigator noted that he was under the impression the defendant had arrived at the scene to commit the offence and was convinced of what he was doing, and that one could also infer this from his statements during the interrogation.

In view of the significance of this, let us cite the essence of the investigator's statement in his cross-examination in court:

*“Q: You heard the recording?”*

*A: Yes*

*Q: You saw the video footage from the incident?*

*A: Yes*

*Q: How much do you recall from the interrogation?*

*A: I recall the suspect's statements precisely.*

*Q: So what was he wearing?*

*A: I remember the statements, not his clothing.*

*Q: Who was with you in the interrogation?*

*A: I was the only one.*

*Q: Were there other detainees?*

*A: No, he was the only one.*

*Q: Do you know the Police Order's instructions as to interrogating minors?*

*A: Yes.*

*Q: You said you tried to call his parents, right?*

*A: Yes, we tried every possible way.*

*Q: Where was this documented?*

*A: There is no documentation. We tried via systems available to the police, to find his parents' phone numbers but we couldn't.*

*Q: You said you asked him if he had his parents' numbers, right?*

*A: Yes*

*Q: How come this cannot be heard on the recording?*

*A: We usually ask for the suspect's details before the interrogation to type the name and phone number on the form. At this stage we don't record since if he wants to consult a lawyer he should have privacy to talk to his lawyer.*

*Q: You read him all the rights at the start of the interrogation?*

*A: Yes, I read it three times. I read him the rights prior to the recording and also during it.*

*Q: This means that you told him three times he could consult a lawyer and that he had the right to counsel from the Public Defense and that his father had the right to attend the interrogation, but he decided not to. Can you confirm that?*

*A: I say again that in offences like that the parents have no right to attend the interrogation.*

*Q: Where does the law state that?*

*A: This is an offence of the type classified by the Police Order. Such offences, which are security-related, and the interrogation was shortly after the incident.*

*Q: What did he respond when you asked him if he had a lawyer?*

*A: He said he had none and I asked him if he had his parents' number to check with them if they had a lawyer. The suspect said he had no number.*

*Q: This too is not on the recording. There's your question if he has a lawyer.*

*A: The question as to the parents was before the recording and he said no, and after failed attempts to locate the parents, I started recording and asked again about a lawyer and he said he doesn't have any.*

*Q: What did you do about his not having a lawyer? Did you try to call the Public Defense? Did you ask him if he wanted a lawyer from the Public Defense?*

*A: The suspect was arrested in March and a procedure was published in April as to the right to counsel for minors and numbers for defence attorneys which were not available before April.*

*Q: Still you made him sign that if he had no lawyer he could get one from the Public Defense, right?*

*A: The documents I made him sign are detailed in the system, as to minors' rights in general and some of these rights related to Public Defense were not relevant before April, as I stated in the previous answer.*

*Q: You made him sign all rights in the rights form?*

*A: Yes.*

*Q: In the clause on parental presence during interrogation I don't see his signature.*

*A: The right to parental presence was not granted since in offences of this type he has no right to this.*

*Q: But it says so on the form.*

*A: Right. The right applies usually. Here it's a bureaucratic error. Perhaps he didn't sign but one can see clearly that I marked this.*

*Q: The interrogation was in Arabic and you typed the statements in Hebrew?*

*A: Right.*

*Q: How accurate are you when you translate?*

*A: Over 90%. Not 100%.*

*Q: You asked him if he wanted to die as a hero or martyr.*

*A: I would like to see the statement. [Witness reviews the statement] It's not there.*

*Q: You said you remembered the interrogation and it's a common question.*

*A: I didn't ask the question during the interrogation of this sort since the suspect had provided personal reasons as pretexts for committing the act and therefore this question was not asked.*

*Q: The problem is that in the recording one does hear you ask him this question and he answered that no, what's your response to that?*

*A: I don't recall such a question if it was asked, and I noted again that in over 90% I write down what I ask, I can't answer you before I hear the recording.*

*Q: In fact a child comes, aged XX, and you see on video that as he was told to stop, he stopped and pulled out a knife and laid it on the ground. He cooperated fully and told you during the interrogation he only wanted to go to prison. You didn't think it would be a good idea to see if he really did this to go to prison and he didn't really want to murder Jews?*

*A: How can I check such a statement if I couldn't reach his family? And we have many cases like that, after they are caught they claim this.*

*Q: You didn't find it necessary to verify his account? That he really worked at XXXX? That his parents really made him work? That he bought the knife with his own money in the market? Did you check in any way?*

*A: The knife was bought in the market which is within the Palestinian area which I have no way of reaching to verify. And I couldn't reach his parents.*

*[The judge asks whether there was no way of reaching the family]*

*A: I checked our databases and couldn't reach the phone number. Numbers of PA residents are on our lists only if they provide a phone number. It's not like in Israel, where I can reach the number via a Telecom company.*

*Q: Did you check his Facebook account?*

*A: No.*

*Q: Why?*

*A: The question was irrelevant to the incident at the time.*

*Q: How so? It's something one checks, whether he wrote a status or talked of anyone.*

*A: We usually check a Facebook profile if suspicion arises from the investigation, as to incitement incidents or that he has a connection to any group, so in the interrogation of the suspect, which seems credible on the face of it, he made claims that did not necessitate checking his profile.*

*Q: So for you, when a minor tells you he went to murder Jews to go to prison your only problem is that he told you in the interrogation, and you didn't think you had to check additional evidence?*

*A: The strongest evidence was the documentation of him reaching the checkpoint with a knife.*

*Q: I mean, evidence of his attempt to murder Jews.*

*A: The evidence in the suspect's statement is that he said several times, and also I have no way of checking except for the statement and intent which was also seen in the recording.*

*Q: I would like to change the questioning. I refer to the police procedures which apply to your role. Was there an officer's decision?*

*A: In the decision as to the incident there is an officer's approval to investigate incidents of this type also without parental presence when one is detained shortly after the incident.*

*Q: This approval too has not been documented.*

*A: No.*

*Q: So like the other things which are supposed to be documented in the memo, this approval too is not documented. In an interrogation you don't really remember, right?*

*A: There is no memo for the officer's approval.*

*Q: And there is no documentation of you trying to contact the parents.*

*A: I repeat, I didn't try to contact them because I didn't find a number. It is not documented.*

*[The judge asks: There is no documentation of your attempt to get the number?]*

*A: No."*

(Court hearing from 2 July 2017, pages 2-5)

After I listened to the recording of the interrogation, I would like to note that it does follow from it, as claimed by the defence, that substantial statements, which were made by the defendant in the recording, are not documented at all in the Police's statement. Thus for example, the investigator only reads aloud the first part of the rights listed in the statement and does not proceed to read the rights in its second part. In addition, the statement does not list numerous important details which were said in the interrogation, including the question by the investigator whether he wanted to die as a martyr and the defendant's answer in the negative. Furthermore, there is no documentation of the defendant answering in the negative initially when asked as to understanding the illegality of his actions and the documentation of what the investigator told the defendant subsequently and due to this the changing of the defendant's account. One should note that a major part of the defendant's answers were made following leading questions posed by the investigator, and these questions were not documented in the statement.

The investigator also claims that some of the things he did during interrogation were not even minimally documented in the case file. For example, there is no record of the attempt to find the parents' phone number. There is no documentation of the officer's approval of the investigation without notifying the parents, of any explanation of the defendant's rights given to him, which was allegedly done three times, but there is no record of it being done fully even once. There is no record of the defendant's statement as to his parents' phone number which was allegedly said at the beginning of his interrogation, there is no record of the defendant's signing of a notification form as to his pre-interrogation rights and his waiver as to the right to counsel, and an explanation about the essence of this form, although the defendant apparently cannot read or write. Furthermore, as stated, a major part of what the defendant said in the interrogation and also a large number of questions posed by the investigator and recorded on tape are not documented at all in the Police statement. As follows from his testimony, the investigator claims he recalls the interrogation well and also listened to the recording prior to his testimony. In view of that, the investigator claims that even though the statements were not documented appropriately he recalls well that all that had indeed happened. In this context he stated in court that he recalls precisely this interrogation and what the defendant said in it, as stated in his response to the Defense's question: "I recall the suspect's statements precisely".

After hearing the interrogator's testimony and listening to the recording of the interrogation, I am under the impression that his statements in court as to recalling precisely the suspect's statements and the conduct of the interrogation are inaccurate.

One of the salient examples of this is the central point referring to the defendant's motive to commit these acts, as follows from his interrogation by the Police.

In this context the investigator was asked during cross-examination whether he recalled having asked the defendant whether he wanted to die as a hero or "shahid". He answers in the negative,

saying he did not pose this question during the interrogation, in spite of the fact that the question, and the defendant's answer in the negative, are on the recording. The interrogation took place on 11 March 2017 and the investigator testified nearly four months after its completion.

In these circumstances I do not believe the investigator really remembered numerous investigation actions in detail, or the precise things the defendant said during a police interrogation which took place four months prior to his testimony in court when these actions are not documented in the case file. This is all the more true in view of the fact that the investigator does not recall a crucial significant detail in the investigation, although he had refreshed his memory before the testimony (the defendant's response to the question whether he wanted to die as a hero or Shahid). Therefore, without the required documentation of the interrogation in accordance with the law and court rulings, one cannot determine, to the necessary level of proof, that what is not documented did indeed take place, as claimed by the investigator. I note that based on the witness' testimony and the additional evidence in the case file, including the recording of the interrogation, I am under the impression that one should assign very low weight to the investigator's statement in his testimony, as to "recalling the suspect's statements precisely", or his recollection of having carried out the aforementioned actions, or that approval had been granted even though this does not appear in the case file.

It is for good reason that the law and court rulings have imposed the duty of recording investigative actions. The lack of documentation of basic investigative actions or the granting of approval by a Police officer, as in this case, requires proof that these actions had indeed been taken, in spite of their not being documented at all as required, which is quite bizarre.

In these circumstances, after hearing the investigator's testimony and reviewing the evidence in the case, I have come to the clear impression that one cannot rely, to the level required by law, on his statements in court that the investigative actions he claims to have taken, which were not documented, had indeed been taken. This is also due to the lengthy period between taking these actions and his testimony in court, the fact that he did not recall in his testimony crucial details of the investigation which were documented in the recording of the interrogation, as well as the nature of the interrogation and its duration. In view of this stipulation, one asks what is the legal significance of not carrying out the aforementioned investigative actions, for the matter of the weight of the defendant's statement in the Police and for the matter of the admissibility of this statement in accordance with the rule of inadmissibility put forward by court rulings.

### **The defendant's testimony**

As part of the defendant's testimony for the defence, he told the court that he is a XX-year-old youth who works for a living in a factory at XXXXX. The defendant also said he did not recall for how many years he went to school before he dropped out. The defendant also testified that he

could not read or write. According to the defendant, during the incident he did not want to kill Jews but wished to be arrested by the security forces. In view of the importance of these statements, let us refer to the defendant's cross-examination in court:

*“Q: Is it true that you're in conflict with your dad?”*

*A: True.*

*Q: He wanted to you to go to work?*

*A: Yes.*

*Q: Is it true you didn't want to go to work?*

*A: Yes*

*Q: Is it true that the knife, you recognize it?*

*A: Yes*

*Q: It was in your possession?*

*A: yes*

*Q: Is it true you bought it in the market?*

*A: Yes.*

*Q: For 15 NIS?*

*A: Yes.*

*Q: Is it true that the knife was in your possession during the incident at the Tomb of the Patriarchs?*

*A: Yes.*

*Q: Why did you buy this knife?*

*A: They sell this knife at the market.*

*Q: Do they sell smaller knives?*

*A: Yes*

*Q: Show me the knife's size, with your hands, more or less.*

*A: You can see in the photo (witness shows with his hands).*

*Q: Were there smaller knives in the market?*

*A: I don't know.*

*Q: Is that the only knife the store had?*

*A: True.*

*Q: You said there were other knives at the market, right?*

*A: There are other knives in the market.*

*Q: You took this knife and went to the Tomb of the Patriarchs with it, right?*

*A: Correct.*

*Q: You came to the checkpoint with this knife, right? And went through?*

*A: I did not go through.*

*Q: You passed the metal detector?*

*A: I passed and went back.*

*Q: When you passed through the metal detector the knife was concealed in your possession, right?*

*A: Yes.*

*Q: If you say you came to the scene to be arrested, why did you conceal the knife and go through the metal detector. There is a chance you could go through and not be arrested, right?*

*A: So that they don't think I want to stab.*

*Q: How did you want to get arrested if you didn't show the knife. The real reason you came there was not to be arrested, right?*

*A: There's no other reason.*

*Q: They regard you as an adult in the house, right?*

*A: Yes.*

*Q: You're responsible for your actions, right?*

*A: Yes.*

*Q: When you say something, they believe you, right?*

*A: Yes.*

*Q: When you spoke to the interrogator, you gave him another reason for coming to the scene, right?*

*A: No other reason.*

*Q: In the recording of your interrogation, you do say something additional as to the reason why you went there, right?*

*A: Yes.*

*Q: Is it true you came there with the intention of stabbing any settler standing in front of you?*

*A: No.*

*Q: Is it true that this is the real reason because you got tired of going to work?*

*A: Yes.*

*Q: So you went there to stab a settler?*

*A: No.*

*Q: You just told me you did come to stab.*

*A: No.*

*Q: In your interrogation you also said you came to stab.*

*A: No.*

*Q: It can be heard on the recording. You want me to play it for you? You know your attorney also said one can hear this on your recording?*

*A: I said this to get arrested.*

*[Judge asks: What did you say to get arrested? That you came to stab Jews?]*

*Q: So if you really came to get arrested, why did you take such a large knife?*

*A: Because there were no smaller knives in the store.*

*Q: You said there were smaller knives in the market.*

*A: I didn't go into the market, I went into the first store.*

*Q: You said there were other stores in the market, right?*

*A: Yes.*

*Q: Why did you go into this one of all stores?*

*A: It's the nearest one.*

*Q: Is it true you have knives at home?*

*A: No.*

*Q: You don't have knives at home?*

*A: Not at all.*

*Q: If we bring your father, will he say there are no knives at home?*

*A: I don't know.*

*Q: And when you eat, there are no knives?*

*A: There are.*

*Q: So there are knives at home. Why do you say false things?*

*A: Because there are no knives in the house, not including the knives for the food.*

*Q: I want you to explain why you took such a big knife and came to the Tomb with it and passed through the metal detector and you concealed it and all this to get arrested? You could have taken a small knife.*

*A: there were no small knives in the store.*

*Q: Why didn't you tell the soldier at the checkpoint to come and arrest you, why did you conceal the knife?*

*A: To get arrested.*

*Q: The store where you bought the knife, what kind of store is it?*

*A: Kitchenware*

*Q: In a kitchenware store there's only one knife?*

*A: There's only this type.*

*Q: Does it sound reasonable to you for people to use such a knife to slice cucumbers or tomatoes and that's the only knife people have in the kitchen? (shows the knife).*

*A: I don't know.*

*Q: It's a large knife, right?*

*A: Yes.*

*Q: Do you work in butchery?*

*A: No.*

*Q: What else does the store sell? Pots etc?*

*A: I don't know.*

*Q: They don't sell pots?*

*A: Only kitchenware*

*Q: What kind of kitchenware?*

*A: Only pots and frying pans.*

*Q: How many kinds of these?*

*A: The pots were of all sizes.*

*Q: So how come there were pots of all types and sizes, but knives of a single size only?*

*A: He ran out of knives and he ordered more merchandise.*

*Q: When you came to the Tomb, you said you wanted to get arrested. So why didn't you wield the knife so that they see you are there to get arrested.*

*A: So that they don't think I want to stab.*

*Q: So how did they arrest you?*

*A: I don't know.*

*Q: Show me a way in which you don't show the knife and you hide it and they would arrest you, after all this is what you wanted, right?*

*A: In the metal detector machine.*

*Q: Why conceal?*

*A: So that they arrest me.*

*Q: Let me repeat what you said in the interrogation. You said you had bought the knife on purpose and planned to stab Jews.*

*A: Wrong.*

*Q: You didn't say that?*

*A: I didn't say that.*

*Q: You said that in the interrogation.*

*A: Let me hear that.*

*Q: (A part of the recording is played). At the Police, when the interrogator asked you if you had come to stab Jews, you confirmed this to him, right?*

*A: Yes, to get arrested.*

*Q: So you did confirm?*

*A: Yes.*

*Q: When he asked you if you had come to stab a settler or someone else, what did you say to him?*

*A: I don't remember.*

*Q: We just heard that.*

*A: I don't remember.*

*Q: Try, maybe you can.*

*A: I don't know.*

*Q: That's not what we hear in the interrogation.*

*A: I don't know.*

*Q: Is it true you came there to stab? Maybe to get arrested as well. You brought a huge knife and concealed it in order to stab settlers.*

*A: There's nothing between us.*

*Q: Did you want to die?*

*A: No.*

*Q: You said you wanted to die during the interrogation.*

*A: I don't remember.*

*Q: You want to hear yourself saying you wanted to die.*

*A: As you wish.*

*Q: Maybe you had several reasons for coming to the Tomb and saying "I will stab a settler, I will go to prison or die as a Shahid".*

*A: No.*

*Q: "...And so all my problems will be solved, I won't have to go to work". If you had stabbed, your problems would have been over?*

*A: I didn't come to stab.*

*Q: Would your problems have ended?*

*A: No.*

*Q: If they sent you home, what would you do to get arrested?*

A: *Nothing.*

Q: *So you didn't want to get arrested?*

A: *I did want to.*

Q: *When someone wants to do something, he makes an effort. If they sent you home would you give up?*

A: *I wouldn't come back.*

Q: *You wouldn't try again?*

A: *I wouldn't try again.*

Q: *Is it true that the interrogator asked you to give your parents' numbers at the interrogation?*

A: *I don't remember".*

The prosecution claimed the defendant's court testimony was full of lies and contradictions and therefore his statement at the Police is preferable.

The prosecution also argued in this context that when the defendant was asked whether knives smaller than the one with which he came to the Tomb were sold, he answered in the positive, and that when he was asked why he came there with such a big knife, the defendant couldn't find a credible explanation.

The prosecution also claims that when the defendant was asked if he had other knives at home, he responded in the negative and later changed his account. An additional claim is that he came up with an unreasonable excuse for having arrived at the scene with such a large knife, due to it being the only knife sold at the store, and that this fact is unreasonable and the defence has brought forward no evidence to prove this although it could have easily presented witnesses for the defense, from the store, who could have corroborated the defendant's account. Furthermore, the Military Prosecution claimed:

*"Furthermore, the defendant could not provide a logical reason why he did not present the knife immediately when he came near the security personnel if his intent was merely to get arrested. Why did he conceal the knife earlier under his clothes, and pass through the metal detector without stating he was holding a knife? If he had wanted to be arrested, he could have stopped his progress earlier. This claim is related to the fact that the defendant also chose to bring such a large knife with him..."*

The prosecution adds that the defendant's account in his testimony in this context is unreasonable, and that his testimony is full of lies and evasive answers and unexplained lack of memory recall. So claims the prosecution:

*"And indeed, as one can see, when the prosecution stated in a question that the real reason the defendant came to the Tomb with a knife was that he "wanted to stab a settler" and "was tired of going to work", the defendant responded in the positive(!) and right after that, as stated previously, retracted this statement. This sequence of events reveals that the defendant's true intention was exposed, as well as his mendacious, fickle character".*

The defence on its part claimed that the defendant presented a clear, structured account in court to the best of his ability and that this account was consistent throughout his testimony. It argues the defendant's account should be accepted, as to his desire to be arrested by the security forces during the incident rather than stabbing a person.

Following my immediate impressions from the defendant's testimony in court and based on the rest of the evidence in the case, I find that he is a boy with a basic education and very meager language who cannot read or write. My impression is not that the defendant's character is mendacious and fickle, as claimed by the prosecution, but rather that he is a young youth who works for a living in XXXXX, who has responded honestly to questions in court and whose testimony was not characterized by sophistication, lies and evasive answers.

My conclusion from the defendant's testimony in court and the evidence in the case is that his account was consistent and lacking significant contradictions. As stated in this account, he wished to be arrested due to a dispute with his father, and therefore he purchased a knife and went directly to the metal detector with the aim of being arrested.

It should be noted that the defendant's account is supported by the two soldiers' testimonies, which describe a confused youth "fearful and in shock", abiding by their instructions in full. I was immediately impressed by the defendant's testimony in court and referring to additional evidence in the case including the recordings and the testimonies that the defendant's account in court as to his aims in the incident were genuine and as stated, his statements are supported by the evidence material including that which was submitted with the agreement of both parties.

I did not find merit in the Military Prosecution's claims that the defendant has lied to this court in a sophisticated manner.

Thus for example, as to the prosecution's claim that during his testimony he "choked" and provided the real account, this claim is baseless and amounts to a wrong interpretation of his testimony.

Relying on the defendant's response with a single word to a sentence composed of two separate questions, when a significant doubt may be cast over his understanding of their meaning considering my impression of him, is highly problematic. Surely in this case one cannot establish a factual finding that the defendant lied to court or "choked" and confessed his real intention due to this response in the way it was provided, and one cannot build mountains based on this statement of his. In order to explain things, we note that the defendant was asked the following in his cross-examination:

*“Q: Is it true you came there with the intention of stabbing any settler standing before you?”*

*A: No.*

*Q: Is it true that this is the real reason because you got tired of going to work?*

*A: Yes.*

*Q: So you went there to stab a settler?*

*A: No.*

*Q: You just told me you did come to stab.*

*A: No.*

*Q: In your interrogation you also said you came to stab.*

*A: No.*

*Q: It can be heard on the recording. You want me to play it for you? You know your attorney also said one can hear this on your recording?*

*A: I said this to get arrested.”*

One can see following a reading of the context in which the question was posed, to which the defendant seemingly answered by admitting the acts alleged against him, that the second question asked is composed of the assumption that the defendant was not pleased with his place of work as well as the questions of whether he therefore set out to commit the stabbing attack based on the earlier question. The defendant's positive answer was clearly attributed to the second part of the question, that is, that he indeed did not want to work at his place of employment, and without his wish to state that he agreed with the claim that he had come to stab. This also follows from the defendant's statements later in the interrogation, and prior to it. In view of this, the attempt to claim that this is a confession to having committed the offence before the court, alongside brazen lies on the part of a defendant with a mendacious fickle nature are very far from reality as reflected in court, and from my immediate impression of the defendant, and this amounts to taking the defendant's statements out of their full context.

As a side note, I note that a response to such a question, which contains an assumption or complexity in the wording, meets the Complex Question Fallacy condition, by which the person questioned is led into a partial or erroneous response which is not sufficiently clear, or reply in a way which "confirms" an assumption in the question without meaning to do so. As to possible fallacies related to such questions, see for example: *Pilgram & Polgar, Questioning The Fallacy of Many Questions, 2007*; and *The Fallacy of Many Questions: Of the Notions of Complexity, Loadness and Unfair Entrapment in Interrogative Theory, Argumentation 1999*.

This risk applies all the more to the defendant whose language skills are meager, has not finished school and his answers were very short, laconic and devoid of sophistication. Therefore, one cannot rely on the defendant's answer at all as an indication of the intent to commit a stabbing attack or of a person with a fickle and mendacious character, as claimed by the prosecution. The conclusion claimed based on this single half-answer is completely detached from the context and content of the question.

The same holds for the prosecution's conclusion that the defendant had lied in his court testimony as to the question of whether he had knives at home. I note that the defendant explained that when he had been asked if he had knives, he responded in the negative since he understood this to refer to his ownership of knives - i.e. are there any knives at home which are yours? The defendant explained that of course there were knives at his home but they did not belong to him specifically but to his family, and that's what he meant. I note that this explanation is reasonable in my view and the defendant's statement in this context cannot be regarded as a lie.

The prosecution's conclusion that the defendant's statement that he had not come to stab anyone was unreasonable since buying a small knife would have sufficed, is baseless as well. I would like to stress that the defendant's answers, considering his character, personality and age in this context are reasonable and one cannot infer that he had meant to stab anyone rather than be arrested because he had bought a larger knife, rather than a small one. I would like to stress that in this case the size of the knife cannot indicate an intent to stab since according to the defendant's statement he wanted the knife to be found by the metal detector so that he gets arrested, and therefore it made sense for him to purchase a large knife.

Furthermore, the prosecution's conclusion that the defendant chose not to pull out the knife before he reached the metal detector indicated that he wanted to stab rather than be caught is also groundless. On the contrary, the soldiers' impression and the video clips indicate that the defendant was "shocked and confused", supporting his account as to wanting to be caught and arrested, and it seems the explanation he has provided for his actions is reasonable.

I also note that even if some contradictions occurred in the defendant's statements, such as what he said about his Police interrogation, in this case the contradictions are not essential so as to

decrease the weight of his testimony significantly. The same holds for the prosecution's conclusions as to the lack of a testimony by the vendor at the store. One can surely doubt whether that vendor recalls the selling of a single knife to a youth several months ago at the Hebron market, and the lack of this testimony does not reduce the credibility of the defendant's account.

### **Should one prefer the defendant's confession to the Police or his court testimony?**

After examining the evidence in the case, and separately from the question of the admissibility of the statement, which we shall discuss separately, let us address the central factual questions which awaits the court's decision, which is: assuming one should accept the defendant's statement to the Police as admissible, should one prefer it to his court testimony or should the opposite be done?

In this context, the Supreme Court ruled the following in case 4142/04 (Milstein v The Military Prosecution):

*"There are numerous reasons for a false confession, but these can be classified into two categories. The main fear regarding false confessions by suspects who had been subjected to illegal measures during their interrogation, such as violence, physical coercion, unfair mental pressure - which made them provide a false confession. As we know, the legal arrangement for such circumstances is in article 12 of the Evidence Order, which stipulates that a confession made outside court shall be admissible only if the prosecution has provided testimony as to the circumstances in which the confession was made and the court has witnessed that the confession was made of one's free will. Article 12, which has been discussed extensively in the rulings of this court, is not of our concern in this case, and it has not been claimed that the defendant's confession had not been issued of his own free will*

*But this does not suffice. There is also a fear that the defendant will deliver during their interrogation - and of their own free will - a false confession, even when the interrogation is conducted lawfully, without the exertion of external coercion means which article 12 addresses. This court has already recognized, in numerous decisions, the possibility that even subjective pressure and internal tension may cause the detainee's spirit to be broken, as if they wished to "commit suicide by confession" (case 48/54). "As a rule, a confession always come with a fear as to the detainee's will to assume responsibility for an act they have not committed, and this is the case even when the fear is not noticeable" (case 6289/94); and also see cases 715/78 and 774/78); case 124/87; case 3967/91; case 3081/91).*

The ruling also specifies the reasons for a false confession:

*"True, it seems, prima facie, that a false confession is an irrational behaviour. However, we must reiterate that the interrogated detainees are not made of a single material. Not all behave as we*

would expect from the reasonable person. An interrogation places the detainee in a threatening situation, to which they are usually not accustomed. This is a coercive situation by nature, placing the detainee under a lot of pressure.

*Not for nothing was it decided that the interrogation - "even if it is not done while using physical means - violates the detainee's liberty. It sometimes violates their dignity and privacy" (cases 4054/95, 5100/94); "In granting the authority to conduct a criminal investigation, the power, and danger, of violating the detainee's privacy, dignity and property exists" (case 4855/03) It was stated that "any interrogation, be it the fairest of all, places the detainee in embarrassing situations, makes things difficult for them, exposes their intimate secrets and soul, and creates grave mental pressure" (Y. Kedmi, On Evidence). In view of this, some have even argued that a false confession is, in some cases, a normal reaction to an abnormal situation in which the interrogation places the detainee:*

*"The false confession is not the product of a diseased mind, different in kind from a normal mind, but is simply an extreme manifestation of quite "normal" and understandable behaviour" (C.J Ayling, Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions, 1984).*

The phenomenon of false confessions by detainees who do so with the intention of harming themselves is well-known in the legal world. Maimonides summed up the Halachic law in this context:

*"It is the scriptures' decree that a court shall not sentence a person to death or lashings by the utterance of his mouth... Lest his mind be lost regarding the matter, lest he be one of the bitter-souled toilers who await death and stab their stomach with swords and throw themselves from roofs, lest that is the case and he would say that which he had not committed so that he may be killed".*

The Supreme Court's rulings since the 1950s describes this phenomenon of defendants who confess to offences they have not committed due to the desire to harm themselves as "seeking to commit 'suicide' by confession" (case 48/54). In case 515/78 (Levy vs. The State of Israel), the following was stated in this context:

*"Two fears accompany a confession by a defendant outside the walls of the court: one, a fear that "external" pressure was exerted on the defendant, causing him to confess to the commission of an act he had not committed at all. Against this pressure stand the statutory barrier of admissibility, stipulated by article 12 of the Evidence Order, which rejects the admissibility of evidence not provided "freely and willfully". The second, fear that the defendant acted out of "internal" pressure, which made him assume responsibility for the commission of an act he had not committed*

*at all, thus driving him to "suicide by confession" (case 48/54). Against this internal pressure, there stands no admissibility barrier, but the court will examine this possibility as part of the weight it assigns to the confession".*

In view of this, the Supreme Court ruled in case 4769/92 that the court must examine in every case whether "internal mental pressure" made the defendant provide a false confession, while, inter alia, quoting Maimonides' saying and the Hebrew law approach:

*"...The court must fear that ulterior reasons have made the defendant commit "suicide by confession" This suicide may be committed knowingly (such as the will to cover up for another person, or the will to bring about the end of the interrogation due to internal mental stress), or unknowingly (due to the detainee's mistaken belief in the veracity of their confession or to mental impairments and distorted perceptions). On the issue of "suicide by confession" our wise elders have noted that "The Sanhedrin (Halachic assembly) shall not sentence a person to death or lashings by the utterance of his mouth...Lest his mind be lost as to the matter, lest he be one of the bitter-souled toilers who await death who stab their stomach with swords and throw themselves from roofs, lest that is the case and he would say that which he had not committed so that he may be killed".*

The Supreme Court ruled in the Milstein case, following these rulings, that every detainee has a different personality and that some groups are more prone to delivering false confessions. The Supreme Court relied in this context also on the Goldberg Commission report (1994), and ruled the following:

*"The Commission has recognized that every detainee has an individual personality structure. Therefore, different detainees will behave and respond differently during the interrogation; every interrogated detainee has a personal "threshold of breakdown", according to their personality and ability to mobilize mental powers to withstand conditions of pressure". The Commission has even alerted us to the danger of a defendant assuming responsibility for an offence they did not commit being higher when it is their first interrogation, when they do not belong to the underworld, and when they have not experienced detention. The psychological and legal literature has offered a row of other possible reasons for false confessions, for reasons other than the exertion of illicit pressure means..."*

Thus for example, this case involves a minor with personal characteristics such as a very basic education who has been arrested and interrogated for the first time, is not a part of the underworld and has a low "breakdown threshold", and hence the court must be especially careful in reviewing his confession to the police. This is intended to prevent the minor from being convicted of the commission of an offense he has not committed. This approach has also found its place in psychological and criminological research, including the following articles:

Klaver, Lee, Gordon Ros - Effects of Personality, Interrogation Techniques and Plausibility in an Experimental False Confession Paradigm, *Legal and Criminological Psychology* (2008) Kassir -False Confessions - Causes, Consequences and Implications for Reform, *Current Directions to Psychological Science* (2008)

After hearing the defendant's testimony in court, the police interrogator's testimony and reviewing the entire investigative material, including recordings of the interrogation and the defendant's statement, I have come to the unequivocal conclusion that one should prefer the defendant's statement in court to his statement during the police interrogation. I am also under the impression that the defendant's statements to the police amount to a "false confession", whose purpose was to bring about his continued detention, as stated in his testimony in court.

As stated previously, the defendant's court testimony regarding the incident was reliable and what he said is also corroborated by the external evidence in the case, including the clips and the testimonies of soldiers who were at the checkpoint. The defendant has testified in a reliable manner in court, with no essential contradictions. I am under the impression that the defendant spoke frankly of the events which took place on the day, while detailing the circumstances which made him buy the knife and march directly from there to the magnetometer at the sentry post.

Unlike the defendant's reliable testimony in court, his statement to the police is unreliable and its weight is low. Listening to the recording of the interrogation, it follows that the defendant sounded very confused and hesitant in his testimony. He lingers a lot before providing answers, and speaks in an unclear, quiet voice. Therefore, the interrogator asked him several times repeated leading questions which were not documented in his statement so that one would be able to understand his statement. Furthermore, the unreliable, confused and hesitant account provided by the defendant during the interrogation does not correspond to his conduct during the incident, as reflected in the video footage and the soldiers' testimonies.

As follows from the soldiers' testimonies, the defendant went straight to the metal detector in order to be caught, he obeyed the soldiers' instructions, and they noted that he seemed "fearful and shocked" to them, rather than as one who has come to stab and assault. This conduct by the defendant prior to being seized and following it attests, as stated previously, to his will to be arrested. In view of the above, after hearing the defendant's testimony and the interrogator's testimony and reviewing all evidential material in the case, including testimonies of the soldiers who seized the defendant, the recording of the police interrogation, the defendant's statement in the police, the clips documenting the arrest and the additional evidential material in the case, I find that in this case the defendant's testimony in court must be preferred to his police statement.

In view of this factual finding, the Military Prosecution has failed to prove the required mental element for the commission of the offence specified in the first indictment count, to the required extent of proof by law, and therefore the defendant must be acquitted in full of the commission of this offence.

As stated previously, according to his confession and the evidential material submitted in court with the agreement of both parties, the defendant is convicted of the offence specified in the second count of indictment - possessing a knife illicitly according to article 248(c) of the Order regarding Security Provisions.

An additional question which has come up during the hearing of this case is one of the admissibility of the defendant's police statement. This question is distinct from the question of whether the Defendant's police statement should be preferred to his court testimony, and we shall address the question now.

### **The admissibility of the defendant's statement**

As stated, the defence argues that in view of the faults in the interrogation, the statement must be disqualified in accordance with the prevalent ruling on the matter. Its main argument is that the defendant had been denied the possibility of exercising the right to counsel by law and that additional rights granted to him by law had been denied. The Prosecution believes that there had been no fault in the conduct of the interrogator and even if that is the case, these were insubstantial faults which should not bring about the disqualification of the statement and do not violate the fairness of the legal process. Let us first address the right to counsel and then address the claims as to additional faults.

The significance of the right to counsel, especially when the interrogated detainee is a minor, has been recognized more than once by the rulings of the Supreme Court and military courts. Thus, the Supreme Court ruled in its guiding decision in case 5121/98 Issascharov vs. The Military Prosecution as to:

*" The significance of the right to counsel*

*A detainee's right to be represented by an attorney and consult them has been recognized as a pivotal basic right in our legal system in the early days of this court (see case 307/60, case 96/66; case 533/82; case 334/85; case 747/86.*

*The significance of the right to counsel at the stage of interrogation stems from the fact that as a rule, an interrogation by persons of authority amounts to a stressing complex situation for whomever is interrogated under arrest while facing their interrogators alone. The common view*

*is that the right to counsel helps uphold the rights of detainees, ensure the fairness of investigative procedures and prevent the exploitation of the structured power relations between the detainee and the interrogating officials. In this context, one notes several reasons for the right of detainees to representation at the interrogation stage: First, the consultation between a detainee and his lawyer helps ensure that they are aware of all their rights, including the right to a fair interrogation without the use of illicit interrogation means, the immunity from self-incrimination and the right to remain silent. One assumes that the attorney will explain to the detainee their right during the interrogation, in a clear simple language, and will clarify the significance attached to a failure to provide an account at the police interrogation. It has been stated in this court's ruling that "The right to counsel contains the legitimate possibility that an attorney would advise a suspect or a defendant to remain silent and not provide the Police with any statement. For this reason, one usually regards the right to counsel as another aspect of the right to remain silent (see case 307/60, case 96/66, case 747/86, case 3412/91' case 1437/02).*

*The right to counsel, therefore, assists in ensuring the detainee is aware of all their rights during the interrogation. Furthermore, the detainee's attorney may assist in maintaining the adequacy of the interrogation and the legality of the means used in it, as well as assisting to ensure the credibility of evidence obtained as part of the interrogative procedure (see case 648/77, where Judge Shamgar points out the reasons for the presence of a defense attorney while a line-up for the identification of a suspect is being held, see also D. Bein "The right of a suspect under arrest to counsel during interrogative procedures - towards solutions of 'reconciliation' ", Hapraklit Journal, 108 (1990). Furthermore, some argue that the representation of a suspect by an attorney contributes to the efficiency of the interrogation, in the sense that the attorney may assist the interrogating officials in locating evidence which supports the the detainee's innocence and even assist in preventing the false confessions by detainees (see Y. Tirosh, "The right to counsel in an interrogation" Mishpat Vetzava Journal, 2000. In view of the aforementioned reasons, the high status of the right to counsel in our legal system is indisputable".*

In accordance with the Issascharov ruling and in view of the significance of the right to counsel, the following was ruled in case 10049/08, as to an implied waiver of the right to counsel:

*"An implied waiver of the right to counsel is not possible*

*105. The Respondent also claims that the appellant's right to counsel was not violated since he had never demanded to see an attorney and had never asked for the interrogation to be stopped until he consults one. The Respondent also claims that it is the suspect's right to counsel rather than the attorney's right, and therefore the suspect may waive this right. According to the Respondent, a lack of demand to see an attorney on the suspect's part is tantamount to an implied waiver of the right to counsel on their part. I will state now that the Respondent's claim as to the*

*possibility of an "implied waiver" is unacceptable in view of the great significance of the right to counsel, as will be detailed. here.*

*Was the Appellant asked if he was willing to waive the right to counsel? Was he asked to sign any form of waiver? Was he notified of the fact that Adv. Meroz wanted to meet him and the Appellant replied he was not interested and wished for the interrogation to go on? The answer to these questions is unequivocally in the negative.*

*I believe the interrogating officials must inquire at their own initiative as to whether the suspect has indeed waived the right to counsel, and they must document the waiver on audio or video tapes, and if there is no alternative - in writing, in order to allow for judicial review at a later stage, as to the implementation of the suspect's basic rights during their interrogation.*

*106. The implied waiver claim in penal law is a complex claim which must be addressed with due diligence. While a waiver of rights in civil law may be done by implied consent, an implied waiver of basic rights in a penal process is the exception to the rule by which a waiver must be willful and explicit, since we are dealing with the laws of human lives...*

*107. Over the years, this court has been asked to decide on an "implied waiver" of rights in the criminal procedure. This court has recognized several restricted exceptions which allow one to infer the waiver of rights in the criminal procedure due to the suspect or defendant's conduct. Thus for example, it has been ruled that it would be possible to infer from a detainee's conduct that they have waived their immunity from self-incrimination, for example when a defendant is aware of their rights and delivers an incriminating statement in spite of that (see case 196/85).*

*108. Nota bene, these are the exceptions which attest to the rule. As to the right to counsel, I believe one should not allow an inference of an implied waiver of this right. The reason for this is that the right to counsel is the key to upholding the rest of the suspect's rights in the criminal procedure, since the purpose of the encounter with an attorney is to allow for a consultation which informs the detainee of their full rights and allows for the monitoring of the conduct of the interrogation in real time. the right to counsel is a pillar and a sine qua non for upholding the rights of suspects and defendants in the criminal procedure.*

*One should note that the suspect is under intense mental pressure at their police interrogation, also due to the allegations hurled at them, and due to being disconnected from their natural environs and family, and in view of the structured power disparity between the interrogated detainee and their interrogators. In such cases, the suspect's attention is not fully paid to insisting on the right to counsel, and therefore I believe one cannot regard their failure to explicitly insist on the right to counsel as a waiver of said right.*

*109. Let it be noted that the aforementioned does not amount to a ban or a refusal to recognize the suspect's right to waive the right to counsel (compare to the view that a suspect cannot waive their right to counsel at all...and nota bene, I believe that the recognition of the possibility of an implied waiver of the right to counsel opens the door to numerous manipulations. Therefore, the manner by which the right is waived must ensure that the detainee has understood the implication of waiving their right. Therefore, even if the waiver is possible, this has to be done willfully and explicitly. This approach corresponds to this court's ruling in the Ben Haim case, by which a waiver of a suspect's basic right in the criminal procedure must be willful and explicit.*

*To summarize, this section, I will stress the principles of my view regarding a suspect's waiver of the right to counsel:*

- a. The waiver must be clear and explicit and an implied waiver is not to be recognized.*
- b. The waiver must be free and willful. The interrogators must not try to influence the detainee by various manipulations into waiving their right.*
- c. Even if the suspect is willing to give their explicit consent to a waiver of the right to counsel, the interrogating team must ensure that the suspect has understood the significance of the waiving in order for it to be willful.*
- d. The interrogating team must document the waiver on video and audio tapes or, if there is no alternative - clearly and explicitly in writing, with the detainee's signature".*

To sum up, according to court rulings, one cannot regard a detainee's failure to insist on their right to counsel as an implied waiver of this right.

This binding ruling by the Supreme Court applies directly in military courts by force of article 86 of the Order Regarding Security Provisions, which states that: "Regarding the laws of evidence, a military court will abide by the mandatory rules in criminal matters in the courts of the State of Israel".

(on this matter, see also N. Benishu, "Criminal law in the Judea, Samaria and Gaza area" Mishpat ve-Tzava, 2005, and case 87/85.

Note that the ruling of the Military Appeals Court has recognized the importance of strict protection of the rights of suspects in interrogation in general, and the rights of suspects who are minors specifically, while specifically addressing the violation of the right to counsel. Thus, the following has been ruled: by judge Col Tzvi Lekach in case 2450/16 + 2451/16:

*"There is no need to elaborate regarding the strict protection of the rights of suspects in interrogation and the rights of minor-suspects specifically. In this case. I have found good sense in the defence arguments regarding the violation of the 14-year-old minor's right to counsel, as ruled in case 9220/12, a violation of the right has implications as early as during the arrest stage".*

As one infers from the court rulings, strict protection of the right to counsel is especially important in the case of minors being interrogated. In view of this, an explicit instruction has been stipulated in article 136c of the Order Regarding Security Provisions:

*“136C. Notifying a minor-suspect of his rights prior to interrogation*

*a. Prior to the interrogation of a minor-suspect, the interrogator will notify the minor, in language clear to the latter considering their age and level of maturity, of their right to counsel in private, in addition to the interrogator’s obligations by any law towards the minor while the latter is a suspect*

*b. Prior to the interrogation of a minor-suspect under arrest, an interrogator will inform the defence attorney whose details were provided by the minor of the latter's interrogation, and this does not detract from the instructions of any law. Notifying a defence attorney whose details were provided by the minor does not serve to delay the interrogation”.*

In case 2683/11, the following has been ruled in this context:

*“The due diligence required prior to the arrest of a minor, mandates, inter alia, that one should refrain from arresting or interrogating a minor in violation of the rules set by law for this purpose, and mandates an explanation to the minor, in a clear language they understand, of their full rights at the onset of the interrogation”.*

In addition to the right to counsel, the law and court rulings have recognized several additional rights which are granted to minor detainees in interrogation, which are anchored, inter alia, in articles 136A and 136B of the Order Regarding Security Provisions:

*“136 A - Notification regarding the interrogation or arrest of a minor-suspect*

*C*

*1. If a minor-suspected of committing an offense (hereby -minor-suspect) arrives at a police station or is brought to it, while they are not under arrest in accordance with the instructions of article 22c of the Order, or if a minor-suspect is arrested, the officer in charge of interrogations at the police station - and in their absence - another officer in charge of the station will inform their parent as soon as possible, after informing the minor of their intention to do so, provided the minor has given contact information for this parent, and if the minor's parent cannot be located with a reasonable effort - an adult relative or another adult known to the minor, provided the minor has given contact information for that other relative, unless there is no possibility of locating any of them with a reasonable effort in the circumstances of the case.*

*2. In spite of the instructions of paragraph 1, no notification will be delivered regarding a minor who has arrived at the station or has been brought in, while not under arrest, if the minor has expressed opposition, based on a reasonable argument, to the delivery of the notification. If the minor is under arrest, due weight will be assigned to their will as to a delivery of notification, considering their age and level of maturity, provided that a notification has been delivered to another relative.*

*D*

*If no notification has been delivered to the parent of a minor-suspect due to the lack of a possibility of locating the former, the Police will notify a parent, as long as the minor is under interrogation or arrest, according to the latest of the two, without delay, when the possibility of locating them with a reasonable effort arises, provided the minor has given the parent's contact information.*

*E*

*1. A failure to deliver a notification to the parent of a minor-suspect and to another relative, for the impossibility of locating any of them with a reasonable effort in the circumstances of the case will be recorded in writing.*

*2. The notification given to the minor, their response as well as their opposition if there is one, and the decision of the officer in charge, will be recorded by the officer in charge by video, audio or writing".*

*"136B - Interrogating a minor-suspect without notifying their parent or another relative*

*A.*

*In spite of the instruction of article 136A, the officer in charge may instruct, based on a decision detailing their reasons in writing, the summoning of a minor-suspect who is not under arrest to an interrogation, or their interrogation, without notifying their parent or another relative of the matter, if the officer in charge is convinced that said notification may -*

- 1. Harm the physical or mental well-being of the minor of another person.*
- 2. Bring about the obstruction of investigative procedures due to a reasonable suspicion that one of those specified in the prefix, or a relative of the minor's parent or of the other relative, was party to the offense of which the minor is suspected.*
- 3. Regarding a minor who is suspected of an offense specified in the first addendum - harm the security in the Area.*

*B.*

*If the officer in charge instructs in accordance with article A, without notifying a parent or another relative of the minor, and eight hours have elapsed since the arrival of the minor at the police station, or the reason justifying the summoning to an interrogation or to an interrogation without*

*parental notification has ceases to exist, according to the earlier of these, the minor's parent will be notified without delay of the minor's presence at the police station and their interrogation, provided the minor has given the parent's contact information.*

*C.*

*If the reason for which no notification has been delivered to the parent or another relative of the minor, the notification will be delivered without delay, unless the authority in accordance with articles 54 and 55 of the Order has been exercised.*

*If no notification has been delivered to the parent of a minor-suspect according to article A, due to the impossibility of locating them, the Police will notify the parent, as long as the minor is under interrogation or arrest, according to the later of these, without delay, once the possibility of locating them with a reasonable effort arises, provided that the minor has given the parent's contact information.*

*D*

*1. The failure to notify a parent or another relative of a minor-suspect due to the impossibility of locating any of them with a reasonable effort in the circumstances of the case will be documented in writing.*

*2. The notification of the minor, their response as well as their objection if there is one, as well as the decision by the officer in charge, will be documented by the officer in charge in video, audio or writing."*

Beyond those provisions, one should note that the Military Appeals Court has adopted the Supreme Court's rulings on the rights of minor detainees in interrogation. The ruling has been summarized by Tzvi Lekach in an article which refers, inter alia, to the legal protection, via court rulings, of the rights of minors in the Judea and Samaria Area during their detention and interrogation (Kremnitzer Book, 2017):

*"Another important point worth noting regards the question of arrest procedures for minors. Although said order states explicitly that it does not apply to arrest procedures, the courts have ruled important norms also as to this stage, while adopting in their rulings the norms that are common in Israel. Thus, in the Abu Rahma case, the court ruled that a minor detainee who was interrogated late at night without the presence of a parent or a lawyer should be released. The court ruled that the weight to be assigned to the defendant's confessions should be limited, and therefore, when evidence only for some of that which was attributed to the defendant in the indictment was found, the justification arose for an alternative to detention. The following statement in the ruling is important to our case:*

*"Although the instructions of Amendment no. 14 to the Youth Law do not apply to the Area, one cannot ignore the wind which blows from these instructions, and the principles at their foundations, as to the protection of the rights of a minor, even if they are suspected of committing offenses, while assigning dominant weight to the principle of the minor's overall well-being, as stated in the draft of the legislation...*

*...Amendment no. 14 also includes limitations on the interrogation of minors. These are limitations which one should apply, in principle, in any appropriate legal system, even if they are not anchored explicitly in legislation, and I am referring mainly to the ban on late night interrogations, and the minor's right to the presence of a parent or another relative in the interrogation, so that they may see to it that the minor's rights are upheld."*

*Thus we see that although the Israeli Youth Law does not apply to the Area, its principles as to the arrest of minors have been implemented in the law of the Area by force of court ruling."*

This ruling as to the need to implement the restrictions on interrogations of minors in every appropriate legal system corresponds to articles 4-6 of the EU Directive 2016/80 from 11 May 11 2016, which regards this matter and elaborates regarding the obligations imposed on the authorities during interrogations of minors.

After reviewing all evidence in the case, including the police interrogator's testimony, the police interrogation recording, and the defendant's court testimony, and considering the arguments put forward by both parties, I find that in the circumstances of the case, the interrogating authorities blatantly violated the rights granted to the defendant by law and ruling. Inter alia, these authorities violated the defendant's right to counsel during his police interrogation and did not inform him properly of this right and his additional rights, in violation of the law and court rulings.

I note that these are not minor insignificant faults occurring in the interrogation, as claimed, but significant and severe flaws, with clear implications according to the instructions of court rulings. The violation of rights is all the more severe considering the defendant's young age and the fact that he cannot read or write, and this has not been addressed by the interrogating authorities.

Such illicit conduct by these authorities amounts to a severe violation of the defendant's right to a fair procedure.

In view of this, and after examining all considerations specified by court rulings and all circumstances of the case, I find that one should accept the defence claims and conclude that the defendant's statement is disqualified in accordance with the norm established by court rulings and is not admissible as evidence.

In this context, one should note that as ruled more than once in criminal cases, the prosecution must convince the court beyond any reasonable doubt that the defendant is guilty. The Supreme Court's statement in case 347/88; Demjanjuk vs. The State of Israel, are relevant to this matter:

*"In criminal law, a burden of proof beyond any reasonable doubt is required of the prosecution. According to our legal and social perceptions, we do not consider a conviction or acquittal simply by the balance of probabilities in favour of one side. The significance of conviction in criminal law is, usually, more severe than winning or losing in a civil law case. Therefore, special and strict criteria have been stipulated as to the burden of proof and its measure. There will be no conviction unless all reasonable doubts have been removed. If a reasonable doubt exists, one does not convict, since better an offender being acquitted than a person being convicted in spite of reasonable doubts regarding his guilt remaining, since another approach may lead to the conviction of an innocent person..."*

*...The criterion by which there is no conviction unless there is evidence of guilt whose measure exceeds any reasonable doubt, is the cornerstone of the criminal law and its mode of operation".*

This approach which is based on Hebrew law also occurs in the Book of Shəmot/Exodus , where it is stated: *"Have nothing to do with a false charge and do not put an innocent or honest person to death, for I will not acquit the guilty."*

Maimonides refers to this in the Book of Mitzvohs:

*"But if we exercise punishment by assessment and semblance, we may kill a clean person one day. It is better and more desirable to exempt one thousand sinners than to kill a single clean person one day"*

(see also Y. Kister, 1961)

In this case, in view of the violation of the defendant's rights during the interrogation, and considering the aforementioned legal principles, no evidence proving that the defendant's statement was taken lawfully, and this statement is inadmissible as evidence. I note that this conclusion is necessary by the facts of the case and the evidence, as well as by a consideration of all circumstances of the case and the tests stipulated by Supreme Court rulings and the Military appeals Court rulings.

## **Conclusion**

In a memorandum for the Ministry of Justice's legislation proposal regarding the amendment of the Evidence Order (The Defendant's Confession), 2015, referring to the amendments proposed for article 12 of the Evidence Order, one reads:

*"The conviction of a person who has committed no wrong, and certainly a conviction which carries a hefty penalty, is one of the most terrible wrongdoings a state may inflict on its citizens. Therefore, as stated by Maimonides, it is better and more desirable to exempt one thousand sinners than to kill a single clean person one day. The purpose of the criminal procedure, and as a byproduct - the purpose of the legal and evidential procedures - is to acquit the innocent and convict the guilty. An external confession by a defendant is a central piece of evidence in criminal trials. In view of the centrality of the confession and its importance to the criminal procedure, and on the other hand, in view of the fear of the conviction of innocent defendants based on a confession, one can hardly exaggerate the importance of the instruction of the law which regulates the admission of confessions in criminal law".*

Maimonides stresses the basic principles of criminal justice. Considering these purposes, in this case, the Defendant must be fully acquitted of the offense of attempted assault under aggravating circumstances, in view of the factual findings as well as the disqualification of his statement.

Furthermore, in view of his confession in court and the evidential material in this case, the defendant is convicted of the second indictment count, to which he has admitted, regarding the offense of possessing a knife, in accordance with article 248(c) of the Order Regarding Security Provisions.

3 August 2017

Signature